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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No. 2.

Jean Bourdieu,

Petitioner,

vs.

Pacific Western Oil Company, a corporation; Kettleman Oil Corporation, a corporation; Kettleman North Dome Association, a corporation; Frank Kennedy and Franklin R. Kenney,

Respondents,

Thomas M. Crum and C. G. Smith, et al.,

Defendants.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

SUBJECT INDEX.

	PAGE
Literal Construction	12
Practice	17

TABLE OF AUTHORITIES CITED.

	PAGE
Cole Silver Mining Co. v. Virginia & G. H. W. Co., 1 Sawyer 685	9
59 Corpus Juris 986	14
Elmendorf v. Taylor, 10 Wheat. 152	9
Equity Rule 39	9
Great West. R. R. v. Swindon, 9 App. Cases 808	14
Hehring v. Taylor, 293 U. S. 507	19
Iselein v. United States, 270 U. S. 245	20
Johnson v. Southern Pacific, 196 U. S. 369	13
Porto Rica R. R. v. Mor, 253 U. S. 245	14
Providence Co. v. Fidelity Co., 80 L. Ed. 385	19
Russell v. Clark's Executors, 7 Cranch. 69	9
Story's Equity Pleadings, 8th Ed., Secs. 77, 96	9
United States v. Standard Brewery, 251 U. S. 10	14
Wabash R. R. v. United States, 178 Fed. 5	20
West v. Randall, 2 Mason 181	9
Zellerbach Paper Co. v. Hehring, 293 U. S. 172	19

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Jean Bourdieu, would show to Your Honors that, being aggrieved by the Decree entered in this case

on the 9th day of November, 1936, reversing the decision of the Ninth Circuit Court of Appeals, in dismissing the case on the ground of jurisdiction in the absence of the United States as a party defendant, and as grounds for this application, respectfully represents to the Court that, as will appear hereafter, this Court has been led into error of both fact and law in entering a decision on the merits against the petitioner.

The issue decided involves the construction of the statute granting the petitioner a preference right to prospect on his land under Section 20 of the Leasing Act. This particular issue was not presented to this Court either in oral argument or in the briefs, as it was not assigned as error in the Petition for Writ of Certiorari. The Circuit Court of Appeals did not pass upon this issue, nor was it asked to do so. In its opinion that Court states specifically that it has considered only the question of jurisdiction [R. 379] relating to parties. There is nothing in the decision indicating that this Court had in mind the cogent reasons which impelled the trial court to sustain petitioner's bill and rule that it stated a good cause of action both on demurrer and at the trial on the merits, when the former ruling was reaffirmed.

We quote herewith the decision *in extenso,* for the convenience of the Court:

> "This is a suit brought by petitioner against respondents to have impressed in his favor a trust in respect of a portion of a lease, executed by the United States, of oil and gas lands in the State of California.
>
> "The bill alleges that petitioner, since March, 1919, has been the owner and in possession of certain legal subdivisions of section 30, Township 21 South, Range

17 East, Mount Diablo Meridian, Fresno County, California, embracing 322.89 acres; that by reason of such ownership, he has been at all times since February 25, 1920, entitled to a preference right for a permit to prospect on such land for oil and minerals and, in case of discovery thereon, to a lease under the provisions of section 20 of the Leasing Act of February 25, 1920, 41 Stat. 437, 445, which provides —'In the case of lands bona fide entered as agricultura, *and not withdrawn or classified as mineral at the time of entry,* . . . the entryman or patentee, or assigns, . . . if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery; . . .' The bill further alleges that petitioner made a *bona fide* entry of the land in question as agricultural; that the land was not withdrawn or classified as mineral at the time of his entry; that the entry was patented to him with a reservation of oil and gas to the United States under the provisions of the Act of July 17, 1914, 38 Stat. 509. In May, 1921, it is alleged, one of the defendants illegally and wrongfully and with knowledge of petitioner's rights, secured a purported permit to prospect for oil and gas on a large tract, which included the land described; that the issue of the permit was in violation of petitioner's preference right and operated to deny his right to procure a United States oil-and-gas prospecting permit to prospect thereon and to a lease in case of discovery, for the reason that no personal notice, as required by regulations of the Interior Department and the provisions of the Leasing Act, or notice of any kind, was given to petitioner, who had no notice of the issue of such purported permit until about the month

of July, 1928. The bill further alleges that Pacific Western Oil Company acquired from the original permittee all his right, title and interest in and to the permit, and that by reason thereof a lease was executed by the Secretary of the Interior to that company, granting the exclusive right to drill and explore for oil and minerals in said lands; that such company is now the legal owner of the lease, and wrongfully holds it in violation of petitioner's prior and superior equitable rights; and that the other respondents named have or claim, adversely to petitioner, some interest in the lands in question and the lease covering the same.

"An amendment to the bill, made by stipulation of the parties, alleges that petitioner's entry was made on March 6, 1919, and patent issued to him on October 7, 1925. Copies of the entry, with Land Office endorsements, and of the patent are attached and made part of the bill. The entry is in usual form and concludes, over the signature of petitioner, with the words, 'Subject to provisions and reservations and limitations of Act of July 17, 1914,' and was stamped by the Land Office, 'Application made in accordance with and subject to the provisions and reservations of the Act of July 17, 1914.'

"The patent expressly excepts and reserves to the United States all the oil and gas in the lands patented, and to it, or persons authorized by it, the right to prospect for, mine and remove therefrom such oil and gas upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914. Section 1 of that act provides that lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, etc., shall be subject to entry, if otherwise available, under

the nonmineral land laws, when made with a view of obtaining title 'with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified . . . together with the right to prospect for, mine, and remove the same; . . . *Provided*, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act.' (C. 142, 38 Stat. 509.)

"There was also attached to the stipulation a copy of an order of withdrawal made by the President December 30, 1910, as follows:

'It is hereby ordered that the following described lands be, and the same are hereby withdrawn from settlement, location, sale or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all of the provisions, limitations, exceptions, and conditions contained in the Act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910: . . .'

"Among the lands described is the land here in question.

"In the district court, respondents moved to dismiss the bill on the grounds, first, that it did not state facts sufficient to constitute a valid cause of action in equity or at law against them or either of them; second, that the United States was an indispensable party to a complete determination of the suit; third, that petitioner was guilty of laches and his cause of complaint was stale. The district court

denied the motion without prejudice to a renewal later and, after answer by respondents, proceeded to a hearing on the merits. After such hearing it held that petitioner was not entitled to a preference right nor to a lease of the lands in question; that respondents Kettleman Oil Corporation and Pacific Western Oil Company were the owners in equal proportions of the oil and gas lease executed by the Secretary of the Interior to the latter company; and that petitioner be denied all relief.

"An appeal followed to the court of appeals. That court, without passing upon the merits, held that the United States was an indispensable party, which could not be sued for lack of its consent, for which reason that court and the district court were without jurisdiction; and upon that ground it dismissed the suit. 80 F. (2d) 774.

"The case presented by the bill comes to this: Petitioner asserts a preference right to prospect for oil and other minerals and, if successful, to obtain a lease under section 20 of the Leasing Act of 1920, in virtue of his homestead entry in 1919 and patent in 1925. It appears, however, from the allegations of his bill and the exhibits attached, that the entry was subject to the provisions of the Act of July 17, 1914, among which is the limitation reserving to the United States all oil and minerals in the lands entered on account of which the lands so entered had been withdrawn or classified 'together with the right to prospect for, mine, and remove the same.' The lands here in question when entered were within the terms of the Executive order of 1910, by which order they were 'withdrawn from settlement, location, sale or entry, and reserved for classification . . .' Whether a 'classification' of the lands was effected by the order

we need not determine since it is clear that they were *'withdrawn' by the definite and unambiguous words of the order;* and, *as shown by the bill, it is enough to exclude complainant from the privileges of the Act of 1920 that the lands were either withdrawn or classified.* It follows that the motion to dismiss on the first ground stated was well taken and should have been granted and the case ended without a hearing, which the district court unnecessarily ordered —evidently out of abundance of caution.

"Since, *plainly,* the bill of complaint did not state a cause of action, the United States could have no interest in the case requiring its presence as a party; and the inquiry as to whether it was an indispensable party, which would have been entirely proper under a good bill, was here wholly gratuitous.

"The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. *West v. Randall,* 2 Mason 181, 196 (opinion by Mr. Justice Story); *Cole Silver Mining Co. v. Virginia & G. H. W. Co.,* 1 Sawyer 685, 689 (opinion by Mr. Justice Field); Story's Equity Pleadings, 8th ed., sections 77, 96. And see *Russell v. Clark's Executors,* 7 Cranch 69, 98; *Elmendorf v. Taylor,* 10 Wheat. 152, 167-168. *Cf.* Equity Rule 39.

"We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in. While the rule as stated is intended for the benefit of a plaintiff whose bill

sets forth a cause of action which he should, if possible, be given an opportunity to prove, the principle it embodies applies with equal, if not greater, reason to a case like this where the bill entirely fails to do so. In such a case, the obvious reply of the court to a suggestion that other parties are indispensible is that—since the bill states no cause of action against anyone, the rights of absent parties are in no way threatened by it, and to enter upon a consideration of the question of their indispensability would be a vain waste of time.

"If it be urged that the United States is an indispensable party and, hence, that the court may not proceed even to inquire whether the bill states a cause of action, the answer is that good sense suggests precisely the contrary. For a mere inspection of *the bill at once discloses that it states no cause of action* and, therefore, the United States is not an indispensable party, since it cannot be prejudiced by, and has no interest requiring protection in, a proceeding which at the threshhold is seen to be without substance. Nothing is to be gained by an inquiry into the status of absent parties when it is certain upon the face of complainant's bill that in no event will he be entitled to a decree in his favor.

"We are of opinion that the court of appeals should have disposed of the case in accordance with that view; and that the district court should have dismissed the bill upon the first ground stated in respondent's motion. Upon the question whether, upon

a good bill, the United States would be an indispensable party, we deem it unnecessary to express an opinion.

"The decrees of both courts below must, therefore, be reversed, and the cause remanded to the district court with directions to enter a decree in accordance with this opinion." (Italics supplied.)

In effect, the above opinion decides that the petitioner's case was entirely without merit. This conclusion is based upon the construction of the statute granting the preference right, and holds that, since it is admitted that the land involved had been "withdrawn" by executive order under the Pickett Act, that the petitioner was barred from asserting a preference right under the statute. The opinion overlooks the fact that the preference right to prospect was granted by the terms of the law to agricultural entrymen whose land was "not withdrawn . . . . as mineral at the time of entry." The decision proceeds on the theory that this qualification or limitation provided by Congress to defeat the preference right should be disregarded and that a withdrawal for any purpose is sufficient. We respectfully urge that a simple "Withdrawal Order" does not in law, and never has in practice, precluded the issuance of a preference right to prospect upon the part of the homesteader under Section 20 of the Leasing Act. As a matter of grammar the language of the statute cannot be so construed without doing violence to its terms and injecting ambiguity.

Literal Construction.

As a matter of law, in order to bar a preference right, Congress provided that the land must be "withdrawn as mineral at the time of entry." This is the literal meaning of the words used. We are not at liberty to insert a comma or period after the word "withdrawn," and thus eliminate the qualifying phrase, "as mineral at the time of entry." If a comma is inserted, as the Court has done, the negative "not" could not modify "classified." This changes completely the intent as expressed by Congress. The only situation which justifies a departure from the literal meaning is where there is ambiguity and the literal meaning cannot be given practical application. In the instant case this is not true, as the phrase, "withdrawn as mineral at the time of entry," is as old as the Land Department. Land was always withdrawn in this qualified sense when the Secretary, as a result of a contest or protest, determined that the land of an applicant was mineral in character. Land in the same general region as the land involved in this suit was "withdrawn as mineral land" in 1908 by operation of the existing mineral land laws, after it had been classified as mineral. This withdrawal was made without reference to any executive Order of Withdrawal, but was made pursuant to this established practice. The first exhibit in the "Book of Exhibits" [R. Vol. 2] shows thousands of acres of land within the blue line which were "withdrawn as mineral land" on June 17, 1908, by operation of the mineral land laws—not an executive Order. The land in issue in

this suit is marked in red and was excluded from such mineral land since it was classified as agricultural. No executive Order was issued on June 17, 1908, when this was done [R. 158-175]. In the *Cleveland-Johnson case* [R. 147], the land was "withdrawn as mineral at the time of entry" as a result of a protest, and the action taken thereafter referred to this practice, and not in distinction an Order of "withdrawal for classification," which had no application and which did not attach. All homesteaders were subject to withdrawal as mineral of their land. They were not subject to executive orders of withdrawal by reason of exemption under the Pickett Act.

The legal principle for which we contend in applying the literal meaning of the statute is clearly established by decisions of this Court. Chief Justice Fuller stated in 1904, in the case of *Johnson v. Southern Pacific*, 196 U. S. 369, at 370, that the literal meaning, as stated in the law, must apply. In that case the court had under consideration the language, "*coupled or uncoupled* without the necessity of men going between the cars." Although there were reasons for holding otherwise, this Court decided that the general clause, "without the necessity of men going between the cars," must modify both antecedents, "coupled or uncoupled." That this literal meaning must be applied in construing the statute in the case at bar is clearly established by the following decisions:

> "Where several words are followed by a clause as much applicable to the first and other words as to the last, the clause should be read as applicable to all."
>
> *Johnson v. Southern Pacific* (1904), 196 U. S. 369, at 370;

United States v. Standard Brewery (1920), 251 U. S. 10;

Porto Rica R. R. v. Mor (1921), 253 U. S. 245;

Great West. R. R. v. Swindon (1885), 9 App. cases 808;

59 *Corpus Juris* 986.

The construction of the statute as to whether it means simply "withdrawn," with a period thereafter, and the elimination of the general phrase, "as mineral at the time of entry," was presented to the trial court in both oral argument and upon printed briefs. After a thorough consideration for the period of a year after submission in which the Court had in mind the application made by the Land Department, as well as the familiarity with which the phrase "withdrawn as mineral at the time of entry" was used by the Land Department, it decided that the literal meaning, "withdrawn as mineral land at the time of entry," was the correct construction, and the Court reaffirmed this construction in its opinion following the trial on the merits. Since that date respondents have not raised the question of construction in briefs or argument and did not present it to the Circuit Court of Appeals.

If we depart from this literal meaning of the words used by Congress, it is necessary to consider the resulting confusion and ambiguity. The preference right would thus be conferred upon all homesteaders whose land was "classified as mineral at the time of entry," contrary to respondents' contention, as the negative could not modify "classified" in that case. The construction "withdrawn,"

as applied by this Court, with a period inserted, necessarily implies, not withdrawn at any time or for any purpose. Such construction would result virtually in the elimination of any preference class, for most all public land had been withdrawn at some time for some purpose. The phrase, "at the time of entry," is indispensable to any clear understanding or application of the statute. It is so obvious that it must be qualified as to time and character that even respondents have not questioned that it must refer to "the time of entry," although they have insisted on excluding the words, "as mineral." This opinion will affect the practice in the future and the rights of many homesteaders under the law.

The only theory advanced by respondents is that Section 20 was an equitable provision for the benefit of homesteaders whose land was unjustly "withdrawn" by an executive Order at the time of entry. The trial court accepted this theory. Referring to such executive Orders of withdrawal, the Court in its conclusion states [R. 255]:

> "I think it is clear that it was classified as oil land by such withdrawal. . . .
>
> "The document amounts to nothing less than a classification of all of the section of land in which the area in suit is located and withdrew such oil land and from all entry of acquisition. . . .
>
> "The order of December 30, 1910, also establishes beyond doubt that the land involved in this controversy was classified as oil land by the Presidential action of that date. . . .

"Executive orders that entirely withdrew and classified land as mineral. . . .

"Executive orders that entirely withdrew land as mineral. . . ."

"The lands had been withdrawn and classified as mineral."

The Court states further [R. 258]:

"There were areas that prior to withdrawal or classification had been bona fide entered as agricultural land and on account of the executive orders all rights of such entrymen were inequitably and seriously impaired and threatened with destruction.

"It was intended to relieve bona fide agricultural entrymen from the stringent, drastic, and inequitable results of executive orders, that entirely withdrew and classified land as mineral."

From the above it is clear that the trial court held that the preference right of Section 20 was intended for agricultural entrymen whose land had been affected at some time by an executive order of withdrawal. In other words, they had been "withdrawn," but were not within the qualification provided by Congress. A simple Order of withdrawal, therefore, could not have defeated their rights. The question was, had their lands been withdrawn as mineral land at the time of entry? If the construction, "withdrawn," is insisted upon, there could be no preference class according to respondents' own theory and under the ruling of this Court.

Practice.

The practice in the Land Department shows that the construction, "withdrawn," cannot be applied and is contrary to the intent of Congress. We appreciate that this practice does not establish the law of the case, but, as this Court has frequently stated, the practical construction applied by the executive department affected must be considered. Practically all the land to whose owners a preference right has been issued under Section 20, had been "withdrawn" at some time, for some purpose. In practice, therefore, a simple "withdrawal" order did not defeat the preference right. Between the years 1900 and 1916 more than sixty-five million acres of public land were affected by a withdrawal order of some character at some time. Sometimes the stated purpose of the Order was for reclamation, power sites, or classification as specified in the particular Order. Preference rights under Section 20 have been issued in all three cases in which such Orders existed at some time and also where such orders were in effect at the time of entry. We refer to 48 L. D. 164, where instructions were issued in 1921 by the Department to the effect that the Carey Act withdrawals were entitled to the preference right. In all cases where a power site "withdrawal" was outstanding at the time of entry the entryman likewise has received a preference right.

We refer to our brief (p. 59) and to the exhibits introduced in evidence [R. 137, 142-148] to eight instances in which the preference right was issued to homesteaders although two different withdrawal Orders affected the land of each homesteader, viz.: a withdrawal for reclamation prior to his application, and a subsequent

"withdrawal" for classification during the time of entry. The record shows that they "remained so withdrawn" [R. 142]. All these homesteaders have received a preference right under Section 20. These exhibits establish that the practice followed by the Department in the practical construction and application of the statute required a qualified "withdrawal" to defeat a preference right. The law provides clearly that it must be a qualified withdrawal. The only qualification provided in the law is, "as mineral at the time of entry." If an executive order of "withdrawal," both prior and during the time of entry, did not defeat these nine homesteaders shown by the exhibits, and the number may be multiplied many times, how can such an Order, issued ten years prior to entry, defeat the preference right of the petitioner?

Not only in practice and in law must the statute be construed as "withdrawn as mineral at the time of entry" in order to bar a preference right, but as a matter of grammar it can be given no other meaning. Cogent reasons must be presented to justify any distortion of the language used, which is done when the construction "withdrawn" is applied. All these reasons of law, of practice, and of grammatical construction, impelled the trial court to decide, after careful study and extended argument and briefs, that it was a good bill and that the case must be tried on its merits. No appeal was taken from this decision and the Circuit Court has had no opportunity to pass upon it. This Court has held repeatedly that a point not raised in the Petition for

Certiorari to review a judgment of a Circuit Court of Appeals will not be considered by this Court.

Providence Co. v. Fidelity Co. (1936), 80 L. Ed. 385;

Zellerbach Paper Co. v. Hehring, 293 U. S. 172;

Hehring v. Taylor, 293 U. S. 507, at 511.

If it is urged that Congress must have intended to refer to any "withdrawal" Order made at any time, for any purpose, the complete answer is that Congress did not say so, and only the intent expressed in the Act can be considered. The words of Justice Sanborn, formerly of this Court, are applicable to this situation:

> "When a legislative body has made a grant or given a permission with a specific exception or limitation, and has made no other exceptions or limitations, a conclusive presumption arises that it intended to make none, and it is not the province of the courts to do so.
>
> * * * * * * * * *
>
> "But the power was conferred and the duty was imposed upon the members of Congress, and not upon the courts, to determine whether or not these exceptions to the express terms of the proviso should be made. They did not make them, and that fact raises a conclusive presumption that they did not intend to make them, and it is not the province of the courts to do so. (List of authorities.) . . . If, however, such an intention ever existed, it was a secret intention that was not expressed in the statute, and it is the intention expressed in the statute and that alone, to which the courts may lawfully give effect. They may not assume or presume

> purposes and intentions that the terms of the law do not indicate, and then enact and expunge provisions to carry on those supposed intentions. The act must be held to mean what it clearly expresses. (United States v. Ninety-nine Diamonds, 2 C. C. A. 9, 12, 139 Fed. 961, 964, 2 L. R. A. (N. S.), 185; Brun v. Mann, 80 C. C. A. 513, 525, 151 Fed. 145, 157, 12 L. R. A. (N. S.) 154.)"
>
> *Wabash R. R. v. United States,* 178 Fed. 5.

The words of Mr. Justice Brandeis, in the case of *Iselin v. United States,* are pertinent:

> "It must be assumed that Congress did not purpose to exempt from taxation this class of tickets. . . . The statute evidently was drawn with care. This language is plain and unambiguous. What the Government asks is not a construction of a statute, but in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function." (List of authorities.)
>
> *Iselein v. United States* (1925), 270 U. S. 245, at 248.

The reasoning above is all the more forceful when the construction requires the omission of words which Congress has specifically provided. From the least favorable standpoint to petitioner, if it is urged that the statute is ambiguous, and that reasons exist which require the Court to disregard the literal meaning of the statute and apply another construction, then the facts surrounding the instant case and the practical construction made by the Department are of controlling importance.

We have presented briefly herein the reasons which governed the trial court in holding that the case presented a good bill. No argument on the merits involving the issue of construction was before Your Honors, and there is nothing in the Decree indicating that it was considered.

Wherefore, in view of the foregoing, it is respectfully urged that this application for a rehearing be granted, in order that this Honorable Court may pass on the question of construction of the statute and determine this issue, or in the alternative that the case be remanded to the United States Circuit Court of Appeals for further proceedings, and we humbly submit to the judgment of the Court if this application be without merit.

Respectfully submitted,

JEFFERSON P. CHANDLER,
HOWARD W. WRIGHT,
ARCHIBALD DORMAN,
Solicitors for Petitioner.

Archibald Dorman, one of the solicitors for petitioner, hereby certifies that in his judgment the petition for rehearing is, in all respects, well founded, that the same is made in good faith, and is not interposed for the purpose of delay.

ARCHIBALD DORMAN.